

E-FILED 03/26/10

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

EXXONMOBIL OIL CORPORATION,

Plaintiff,

v.

GASPROM INC., and DOES 1 through
50, inclusive,

Defendants.

AND RELATED COUNTERCLAIM.

Case No. CV-08-07259 PSG (Ex)

Hon. Philip S. Gutierrez

**~~REVISED PROPOSED~~ FINDINGS
OF FACT AND CONCLUSIONS OF
LAW**

Trial Date: March 9, 2010

Time: 9:30 a.m.

Ctrm: 790

1 2:18-3:2, Testimony of Ena Williams and Mario Sistos re value and importance of
2 ExxonMobil's control of fore court.]

3 7. All of the improvements and equipment at the Marketing Premises,
4 including the improvements that are the subject of Gasprom's renovation project
5 discussed below, are owned by ExxonMobil and leased to Gasprom under the CODO
6 Lease portion of the parties' Franchise Agreement, including Article 9 entitled
7 Equipment Lease. [PTCO, Admitted Fact No. 9, Testimony of David Watson; Trial
8 Exhibit No. 1, CODO Lease Provisions, Section 1.1, Article 9; and, CODO Lease
9 Schedule.]

10 8. The CODO and Equipment Lease provisions of the parties'
11 Franchise Agreement provides that Gasprom may not alter or improve any part of the
12 marketing premises without ExxonMobil's prior written approval. [PTCO, Admitted
13 Fact No. 10, Testimony of David Watson; Trial Exhibit No. 1, CODO Lease
14 Provisions, Section 9.2.]

15 9. The CODO and Equipment Lease also provides that Gasprom: (1)
16 shall make no additions or alterations to the leased equipment without ExxonMobil's
17 prior written approval; (2) shall not do or permit to be done anything prejudicial to
18 ExxonMobil's title to the leased equipment; and, (3) shall not remove the leased
19 equipment or deliver it to anyone but ExxonMobil or ExxonMobil's designee.
20 [PTCO, Admitted Fact No. 11, Testimony of David Watson; Trial Exhibit 1, CODO
21 Lease Provisions, Section 9.2.]

22 10. Gasprom and ExxonMobil had disputes over the Lease Agreement
23 and Franchise Agreement that led to the parties filing cross-actions against each other
24 in April 2005 ("Prior Litigation"). [PTCO, Admitted Fact No. 3.]

25 11. Pursuant to mediation, the parties settled the Prior Litigation by
26 entering into a Settlement Agreement in December 2006 which, among other things:
27 (1) dismissed the Prior Litigation; (2) confirmed that the Lease Agreement remained
28 in full force and effect except for some amendments not relevant to this case; and, (3)

1 reinstated the Franchise Agreement for a new three year term from September 1, 2006
2 to August 31, 2009 (“Settlement Agreement”). [PTCO, Admitted Fact Nos. 4 and 5;
3 Trial Exhibit No. 4; Testimony of Ena Williams and Samuil Preys.]

4 12. Effective September 1, 2009, the parties entered into a new three
5 year Franchise Agreement containing the same terms and provisions with respect to
6 the improvements and equipment at the Marketing Premises. [PTCO, admitted Fact
7 No. 18, Testimony of David Watson; Trial Exhibit No. 77.]

8 13. Under the Settlement Agreement ExxonMobil also reimbursed
9 Gasprom approximately \$76,000 for fuel dispensers and related equipment that
10 Gasprom had purchased and installed at the Marketing Premises during the period
11 when the Prior Litigation was ongoing. [PTCO, Admitted Fact No. 6.]

12 14. The Settlement Agreement further states that Gasprom desires to
13 make certain alterations and improvements to the marketing premises. However, the
14 Settlement Agreement also provides that any such alterations and improvements will
15 be subject to the standard terms, conditions, and approvals otherwise applicable to
16 ExxonMobil franchisees in respect of such matters. [PTCO, Admitted Fact No. 7.]

17 15. Prior to entering into the Settlement Agreement, Gasprom
18 submitted to ExxonMobil for preliminary review two schematic drawings of its plans
19 to renovate the Marketing Premises by adding a drive-through car wash, eliminating
20 the service bays and expanding the convenience store. [PTCO, Stipulated Fact No. 1;
21 Trial Exhibit No. 2, Testimony of Ena Williams and Samuil Preys.]

22 16. The foregoing improvements involved the so-called “back court”
23 of the Marketing Premises, which refers to the area occupied by the service station
24 office, convenience store and repair facilities. By comparison, the area of the
25 Marketing Premises occupied by the fuel islands, canopies, dispensers, underground
26 storage tanks, and related piping and environmental equipment is known as the “fore
27 court.” [Testimony of David Watson, Mario Sistos and Ena Williams.]

28 17. An ExxonMobil employee, working at the Company’s offices in

1 Fairfax, Virginia, reviewed the schematic drawings and, on October 6, 2006 prepared
2 an e-mail setting forth his suggested changes with respect to the proposed car wash
3 and convenience store. [Testimony of Ena Williams; Trial Exhibit No. 3.]

4 18. Prior to submitting the schematic drawings to ExxonMobil,
5 Gasprom had submitted the plans and drawings of its proposed renovation project to
6 local permitting authorities for review. As a result, the permitting authorities advised
7 Gasprom that in order to construct the car wash and expand the convenience store,
8 Gasprom would be required to increase the number of parking spaces and relocate the
9 spaces to the front and side of the convenience store. [Testimony of Samuil Preys.]

10 19. The need for such additional parking intruded into the area
11 occupied by one of the fueling islands and required the following modifications to the
12 fore court: (1) removal of two motor fuel dispensers; (2) relocation of two other
13 dispensers; (3) reconfiguration of one of the fuel islands and overhead canopy; and,
14 (4) removal and reinstallation of piping and environmental equipment associated with
15 the foregoing dispensing equipment. [Testimony of Samuil Preys.]

16 20. Gasprom did not advise ExxonMobil about any of the following:
17 (1) its plans had already been submitted to the local permitting authorities for review;
18 (2) the local authorities required additional parking that would impact the fore court;
19 and, (3) such impact would require the elimination of two of ExxonMobil's fuel
20 dispensers and the other substantial modifications to ExxonMobil's property described
21 above. [Testimony of Samuil Preys and Ena Williams.]

22 21. On October 20, 2006 ExxonMobil Area Manager Ena Williams
23 signed a document entitled Memorandum of Preliminary Review which provided as
24 follows:

25 Upon completion of initial review of architectural site plans
26 for the property commonly known as 3995 E. Thousand
27 Oaks Boulevard, Thousand Oaks, California, attached hereto
28 as Exhibit A, subject to full implementation of changes

1 suggested in October 9, 2006 communication, attached
2 hereto as Exhibit B, and full compliance with the parameters
3 of Exxon Mobil Dealer Financed Improvement Program,
4 ExxonMobil has no objection to initiation of State, City and
5 Municipal permit entitlement process.

6 [PTCO, Stipulated Fact No. 1; Trial Exhibit No. 2;
7 Testimony of Ena Williams.]

8 22. Exhibit A to the Memorandum of Preliminary Review consisted of
9 the two schematic drawings that Gasprom had submitted to ExxonMobil and Exhibit
10 B to such Memorandum was the e-mail from the ExxonMobil employee in Fairfax,
11 Virginia setting forth ExxonMobil's suggested changes with respect to the car wash
12 and the convenience store expansion. [Trial Exhibit No. 2; Testimony of Ena
13 Williams.]

14 23. Neither Ena Williams nor any other ExxonMobil employee
15 involved in the settlement of the Prior Litigation or the preliminary review of
16 Gasprom's renovation project understood that the project involved the elimination of
17 two of ExxonMobil's fuel dispensers and the other substantial modifications to
18 ExxonMobil's equipment and improvements in the fore court of the Marketing
19 Premises. [Testimony of Ena Williams.]

20 24. The Exxon Mobil Dealer Financed Improvement Program
21 ("DFIP") was an ExxonMobil program for dealers, such as Gasprom, who leased their
22 marketing premises from ExxonMobil to make improvements to their marketing
23 premises at their cost. The DFIP applied to improvements in the back court of the
24 marketing premises only and did not involve improvements to the fore court where
25 ExxonMobil owned the dispensers, storage tanks, lines and related environmental
26 equipment. [Testimony of David Watson and Ena Williams; Trial Exhibit No. 9;
27 PTCO, Stipulated Fact No. 4.]

28 25. Because Gasprom was required to eliminate and relocate

1 dispensers, islands, canopies, piping and related environmental equipment in the fore
2 court of the station in order to allow for additional parking required by the local
3 authorities, Gasprom's renovation project could not "fully comply with the parameters
4 of the [DFIP]" which was an express condition of Ena Williams' Memorandum of
5 Preliminary Review. [Trial Exhibit No. 2; Trial Testimony of David Watson and Ena
6 Williams.]

7 26. Around May, 2007, ExxonMobil Territory Manager David Watson
8 learned that Gasprom was contemplating a renovation project involving the
9 construction of a car wash. [Testimony of David Watson.]

10 27. At the time Mr. Watson learned about Gasprom's proposed
11 renovation project, Watson gave the Gasprom key dealer employee, Samir Chahayad,
12 a package of materials describing the DFIP program including a DFIP application
13 form. Watson advised Chahayad that Gasprom should review the materials and
14 submit the completed application which is the necessary to initiate the DFIP process.
15 [PTCO, Stipulated Fact No. 2: Testimony of David Watson; Trial Exhibit No. 9.]

16 28. On or about May 17, 2007 Gasprom filed a Minor Modification
17 Application with the City of Thousand Oaks for a permit to expand and renovate the
18 convenience store, remove the three bay automotive garage and construct a drive-
19 through car wash. Gasprom's proposed renovation project included, among other
20 modifications the following changes to the marketing premises: (1) removal of two
21 motor fuel dispensers; (2) relocation of two other dispensers; (3) reconfiguration of
22 one of the fuel islands and overhead canopy; and, (4) removal and reinstallation of
23 piping and environmental equipment associated with the dispensing equipment.
24 [PTCO, Admitted Fact No. 8; Testimony of Samuil Preys; Trial Exhibit No. 12.]

25 29. Watson gave Chahayad the DFIP package, including the
26 application form, at or before Gasprom filed its application for a minor modification
27 use permit with the City of Thousand Oaks. [Trial Exhibit No. 12, Testimony of
28 Samuil Preys.]

1 30. Gasprom ignored Watson's request and did not submit its DFIP
2 application to ExxonMobil until October 2008, months after the present dispute had
3 arisen and on the eve of the commencement of this civil action. [Testimony of David
4 Watson, Trial Exhibit No. 48.]

5 31. Had Gasprom filled out and submitted the application to
6 ExxonMobil in a timely fashion as Watson had requested, ExxonMobil would have
7 discovered that Gasprom's proposed renovation project involved substantial
8 modifications to ExxonMobil's equipment and facilities in the fore court and was,
9 thus, not permitted under the DFIP program. [PTCO, Stipulated Fact No. 3;
10 Testimony of David Watson and Trial Exhibit No. 12.]

11 32. Gasprom obtained its Minor Modification Use Permit on January
12 30, 2008. [PTCO, Admitted Fact No. 12; Testimony of Samuil Preys; Trial Exhibit
13 No. 26.]

14 33. ExxonMobil did not grant Gasprom prior written approval to
15 eliminate and relocate dispensers and make substantial changes to ExxonMobil's
16 facilities and equipment in the fore court of the Marketing Premises. Nor did
17 ExxonMobil give Gasprom prior written approval to apply for permits to pursue a
18 project that included such changes to the fore court. [Testimony of Ena Williams.]

19 34. Specifically, in executing the Memorandum of Preliminary
20 Review, ExxonMobil believed that the proposed project involved only the
21 construction of a car wash and expansion of convenience store, all in the back court.
22 Gasprom did not advise ExxonMobil, and ExxonMobil did not know that Gasprom
23 also intended to make substantial changes to the equipment and facilities in the fore
24 court. [Testimony of Ena Williams and Samuil Preys.]

25 35. The California Air Resources Board had issued regulations
26 requiring the installation of an Enhanced Vapor Recovery system (hereinafter referred
27 to as "EVR") at all service stations in the state. [PTCO, Admitted Fact No. 13.]

28 36. Under the parties' sublease, ExxonMobil was obligated to repair

1 and replace various equipment including but not limited to the vapor recovery
2 systems. Gasprom was obligated to cooperate with ExxonMobil in connection with
3 repairing and replacing such vapor recovery equipment. [PTCO, Admitted Fact No.
4 14.]

5 37. In April, 2008 ExxonMobil applied to the City of Thousand Oaks
6 for permits necessary to install an EVR System, known as a Healy System, on the
7 Marketing Premises pursuant to the mandate contained in regulations of the California
8 Air Resources Board. [PTCO, Admitted Fact 15; Testimony of Mario Sistos.]

9 38. ExxonMobil's EVR permit application for the Healy System was
10 denied by the City because the application was based on plans and drawings of the
11 existing service station facilities and equipment which conflicted with the plans and
12 drawings that the City had approved in connection with issuing Gasprom a minor
13 modification use permit. [PTCO, Admitted Fact Nos. 16 and 17; Testimony of Mario
14 Sistos; Trial Exhibit Nos. 29, 30, 45.]

15 39. In April 2009, ExxonMobil completed the EVR upgrade at the
16 Marketing Premises. [Testimony of Andre Reed.]

17 40. As a consequence of the conflict between the existing plans and
18 drawings of the Marketing Premises on which ExxonMobil had based its EVR permit
19 application and the plans and drawings on which Gasprom had obtained its minor
20 modification use permit, ExxonMobil was required to redesign its EVR project and
21 resubmit its EVR application. ExxonMobil incurred \$ 3,700 in costs to redesign the
22 EVR system for the Marketing Premises which it would not have incurred but for the
23 conflict in plans and drawings. [Testimony of Andre Reed.]

24 41. ExxonMobil has also requested as damages the sum of \$22,500
25 representing the cost of an electrical power source at the Veeder Root Cannister
26 System that it eventually installed on the Marketing Premises. ExxonMobil contends
27 that it would not have incurred these costs but for Gasprom having obtained a use
28 permit based on plans that conflicted with ExxonMobil's plans for the original EVR

1 installation. [Testimony of Andre Reed.]

2 42. It is not reasonably certain that the installation of the Veeder Root
3 System cost ExxonMobil more than what the installation of the Healy System would
4 have cost ExxonMobil. [Testimony of Andre Reed.]

5 43. Notwithstanding ExxonMobil's objections to Gasprom's
6 renovation project, Gasprom refused to withdraw its minor modification use permit or
7 terminate the project. [Testimony of David Watson; Trial Exhibit No. 32.]

8 44. As of October 2008, Gasprom had completed or nearly completed
9 its plan check and had filed applications for building permits for the project.
10 [Testimony of Samuil Preys; Trial Exhibit Nos. 39, 40.]

11 45. But for ExxonMobil having commenced this civil action, Gasprom
12 would have proceeded with the construction of its renovation project to completion.
13 [Testimony of Samuil Preys.]

14 46. ExxonMobil has a policy to retain control of the repair,
15 maintenance and replacement of equipment in the fore court in order to manage the
16 environmental risk associated with motor fuel storage tanks, lines and dispensing
17 equipment. [Testimony of Ena Williams and Mario Sistos.]

18 47. It is extremely difficult, if not impossible, to calculate with any
19 degree of reasonable certainty the damages that ExxonMobil will incur if Gasprom is
20 permitted to proceed with its renovation project that includes removing two of
21 ExxonMobil's fuel dispensers, relocating two others and making the other substantial
22 modifications to the fore court of the Marketing Premises because of the following:

23 a. It is impossible to calculate the lost volume of gasoline sales as a
24 result of eliminating one or more dispensers;

25 b. It is impossible to quantify the environmental risk associated with
26 Gasprom assuming control of the replacement of dispensers and associated piping and
27 environmental equipment; and,

28 c. The Marketing Premises is unique improved real property.

1 [Testimony of Ena Williams and Mario Sistos; Trial Exhibit No. 1.]

2 48. ExxonMobil has performed all the terms and conditions on its part
3 to perform under the parties' Franchise Agreement and Settlement Agreement.

4 [Testimony of David Watson and Andre Reed.]

5 49. If and to the extent that any foregoing Finding of Fact is actually a
6 Conclusion of Law, then it shall be deemed a Conclusion of Law.

7 CONCLUSIONS OF LAW

8 1. There is complete diversity between the plaintiff and defendant
9 and the amount in controversy exceeds \$75,000 exclusive of costs and attorneys fees.
10 The Court has original subject matter jurisdiction under 28 U.S.C. Section 1332.

11 2. Venue of this action is proper in the Central District of California
12 pursuant to 28 U.S.C. Section 1391(b).

13 3. Gasprom breached the Franchise Agreement, including the
14 sublease and Equipment Lease provisions thereof, when it obtained, without
15 ExxonMobil's prior written approval, a Minor Modification Use Permit that would
16 eliminate ExxonMobil's dispensers and modify other ExxonMobil equipment and
17 improvements in the fore court of the Marketing Premises.

18 4. Gasprom also breached the Franchise Agreement when it failed to
19 comply with the DFIP, which is the program by which lessee franchised dealers, such
20 as Gasprom, were to remodel or renovate the back court of their marketing premises.

21 5. Gasprom threatened to further breach the Franchise Agreement
22 when it refused to withdraw its Minor Modification Use Permit and terminate its
23 renovation project advising ExxonMobil instead that it intended to continue with the
24 project.

25 6. Gasprom's foregoing actual and anticipatory breach of the
26 Franchise Agreement also constitutes a breach of the Settlement Agreement because
27 the Settlement Agreement provided that Gasprom's alterations and improvements will
28 be subject to the standard terms, conditions, and approvals otherwise applicable to

1 ExxonMobil franchisees in respect of such matters which included the terms and
2 conditions of the Franchise Agreement and the DFIP.

3 7. ExxonMobil has been harmed by Gasprom's breach when
4 ExxonMobil was required to redesign its EVR system to accommodate the plans and
5 drawings that Gasprom had filed with the City of Thousand Oaks in order to obtain its
6 minor modification use permit.

7 8. As a result of such harm, ExxonMobil has incurred losses for
8 which it is entitled to damages in the sum of \$ 3,700.

9 9. ExxonMobil is not entitled to recover damages in the requested
10 sum of \$22,500 as the additional cost of installing the Veeder Root Cansister system
11 because such damages are speculative and uncertain.

12 10. ExxonMobil does not have an adequate remedy at law in the event
13 that Gasprom proceeds, as it intends, with its current renovation project pursuant to
14 the Minor Modification Use Permit.

15 11. ExxonMobil is entitled to a permanent injunction restraining
16 Gasprom from proceeding under the Minor Modification Use Permit and proceeding
17 with its renovation project involving the renovation of the fore court.

18 12. As the prevailing party, ExxonMobil is entitled to recover its costs
19 of suit and, the Court will consider a motion for recovery of attorneys fees that
20 complies with Local Rules 7-3 and 54-12.

21 13. If and to the extent that any foregoing Conclusion of Law is
22 actually a Finding of Fact, then it shall be deemed a Finding of Fact.

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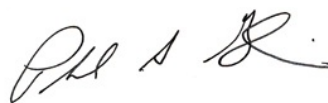
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1 Let judgment be entered according to these Findings of Fact and
2 Conclusions of Law and the Court's February 12, 2010 Minute Order Granting
3 ExxonMobil's Motion for Summary Judgment on Counterclaims.

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6 Dated: 03-26-10



Phillip S. Gutierrez
United States District Judge

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10 Submitted by:

11
12 Dated: March 24, 2010

JOHN M. ROCHEFORT
MARTHA S. DOTY
ALSTON & BIRD LLP

CRAIG J. WHITNEY
EXXON MOBIL CORPORATION

16 /s/ John M. Rochefort

John M. Rochefort
Attorneys for Plaintiff/Counterdefendant
EXXONMOBIL OIL CORPORATION